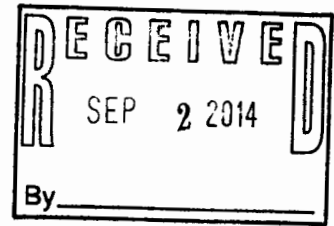


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**Steptoe**  
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September 2, 2014

**VIA EMAIL AND U.S. MAIL**

Headquarters – Freedom of Information Staff  
Records, Privacy, and FOIA Branch  
Office of Information Collection  
Office of Environmental Information  
Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington D.C., 20460  
Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: Freedom of Information Act Appeal – FOIA Req. EPA-R10-2014-002963**

Dear Sir or Madam:

I am writing on behalf of the Pebble Limited Partnership (“PLP”) to appeal the response of the U.S. Environmental Agency (“EPA”) to PLP’s January 22, 2014 request under the Freedom of Information Act (“FOIA”). EPA previously assigned number EPA-R10-2014-002963 to that request (“Request”). A copy of the Request is attached to this letter as Ex. 1.

The Request seeks documents evidencing certain communications relating to the so-called Pebble mine project (“Pebble” or the “Pebble Project”) that PLP hopes to develop in Alaska. The Pebble Project has been the subject of criticism by numerous environmental groups as well as certain Native American tribes. PLP’s Request seeks materials describing communications regarding Pebble between EPA officials, environmental groups, and tribal representatives. Among the items sought are documents evidencing communications to and from former EPA Administrator Lisa Jackson, including her secondary (*i.e.*, Richard Windsor) email account.

In response to the Request, EPA has since January 2014 provided PLP with approximately 500 documents on the FOIA webpage, and has told PLP that EPA’s online Bristol Bay reading room contains “some” additional responsive materials. 3/28/14 Anderson-Carnahan Letter, Ex. 2. EPA’s last production on August 11, 2014 included a chart listing approximately

180 documents that EPA seeks to withhold on grounds of the deliberative process privilege. Chart, Ex. 3. Finally, some produced documents were redacted by EPA based upon its claim that they contain information falling within the privilege. *See, e.g.*, 02/23/11 North Email, Ex. 4.

PLP submits the present appeal letter because EPA's response to the Request is deficient. EPA has improperly relied on the deliberative process privilege to withhold and redact documents, and has failed to conduct a thorough search for materials responsive to the Request. Given the limited information available regarding EPA's privilege analysis and document searches, PLP cannot define the shortcomings in EPA's response in great detail, and, in any event, EPA's own regulations state that such detail is unnecessary. 40 C.F.R. § 2.104(j) (2013) ("[t]he appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed . . ."). Nonetheless, we set forth below some of the facts supporting the conclusion that EPA has fallen short of its FOIA obligations. Before turning to that topic, however, we first address the timeliness of the present appeal.

## **I. This dispute is ripe for administrative appeal**

This appeal is timely because EPA completed its production of documents in response to the Request on August 11, 2014. EPA first produced documents in response to the Request on March 28. On June 23 – approximately five months after PLP served the Request – EPA's Elizabeth McKenna told PLP's Peter Robertson that the agency would complete its response by July 25. 6/23/14 McKenna email, Ex. 5. Thereafter, on August 11, EPA produced additional responsive documents to PLP on the FOIA website, including the chart describing allegedly privileged documents. Importantly, EPA also stated on the website at that time that its response to the Request was "Closed." Excerpt from FOIA website, Ex. 6.<sup>1</sup>

The current appeal is also timely under FOIA's express terms. FOIA requires EPA to produce responsive documents or issue a denial within 20 business days after receiving a request, absent "unusual circumstances" or "exceptional circumstances" as defined in the statute. 5 U.S.C. § 552(a)(6)(A)-(C) (2012). Far more than 20 business days have passed since EPA received the Request; and neither "unusual circumstances" nor "exceptional circumstances" are present in this case. Accordingly, this dispute is ripe for appeal.

## **II. EPA's assertions of deliberative process privilege are unwarranted**

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<sup>1</sup> A few days earlier, on August 8, Ms. McKenna had left a voice-mail for Mr. Robertson regarding the Request. In response, PLP's counsel repeatedly contacted Ms. McKenna and wrote to the EPA FOIA Liaison, Larry Gottesman, to discuss her call, but received no response. 8/25/14 Sloniewsky email, Ex. 7.

EPA has withheld and redacted numerous responsive documents based upon the deliberative process privilege. While EPA's last production included a chart listing withheld documents, that chart does not justify EPA's assertions of the privilege, does not provide information regarding the authors or addressees of the documents, and does not describe adequately the documents' contents. For instance, the first document identified in the chart is described merely as being dated May 20, 2010 and having a subject line of "Village density vs. local resources." Chart, Ex. 3 at 1. This falls far short of colorable information supporting an assertion of privilege.

FOIA mandates a strong presumption in favor of disclosure, and exemptions from the statute are narrowly construed. *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 25, 32 (D.C. Cir. 2002). While we possess only limited information regarding the documents or portions of documents that EPA has withheld, the available facts demonstrate that the deliberative process privilege does not apply here. At least four factors support this conclusion.

**First**, the government misconduct exception to the deliberative process privilege applies in this case. Under that exception, "where there is reason to believe the documents sought may shed light on governmental misconduct, the [deliberative process] privilege is routinely denied, on the grounds that shielding internal governmental deliberations in this context does not serve the public's interest in honest, effective government." *Nat'l Whistleblower Ctr. v. Dept. of Health and Human Servs.*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (quoting *In re Sealed Case*, 121 F. 3d 729, 738 (D.C. Cir. 1997)); *MacLean v. U.S. Dep't of Def.*, No. Civ. 04CV2425, 2005 WL 628021, \*\*3-4 (S.D. Cal. Mar. 16, 2005).

Here, the government misconduct exception applies because evidence of wrongdoing exists and the Request seeks to determine the scope of such wrongdoing. In particular, PLP has uncovered evidence that EPA decided to block the Project in 2010 or earlier, well before subjecting it to a formal scientific analysis. At the time of the decision and for years afterwards, EPA engaged in extensive private communications with anti-Pebble groups regarding the Project. Many of those communications involved the anti-Pebble groups providing EPA with legal and technical advice to support a decision blocking the Project. PLP has also located evidence suggesting that EPA may have encouraged certain Indian tribes to submit a petition to EPA in 2010 to block the Pebble Project under Section 404(c) of the Clean Water Act. EPA has repeatedly cited the tribes' petition as justification for its decision to assert authority under Section 404(c). Finally, the EPA employee at the heart of this matter, Phillip North, has fled the country to avoid testifying about work on Pebble. EPA has asserted that potentially relevant North documents may have been lost, and substantial evidence has been provided in other litigation that EPA has failed to secure, or has destroyed, emails and texts of high-level EPA officials (for instance, Lisa Jackson).

The Request is intended to further uncover potential EPA misconduct arising in connection with the Pebble Project. Because colorable evidence of misconduct has already come

to light, the exception for governmental wrongdoing applies in this case, and the deliberative process privilege does not extend to the requested materials and information.

**Second**, some of the subject documents are likely factual, rather than deliberative, and hence are not protected by the privilege. *Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 37 (D.D.C. 2006). For instance, a substantial portion of the withheld materials appear to address EPA's assessment of the Bristol Bay watershed. Chart, Ex. 3. But EPA itself has stated in its Response to Peer Review Comments on the May 2012 and April 2013 assessment drafts that the "assessment is based on available data and is intended as a background scientific document *rather than a decision document* . . . ." Response to Peer Review Comments at 35 (emphasis added). Accordingly, the assessment itself, any documents respecting its preparation, and any related materials must be considered factual and hence outside the privilege. *Heartwood*, 431 F. Supp. 2d at 37 (finding environmental assessment drafts are not deliberative).

**Third**, the deliberative process privilege applies solely to "predecisional" documents, *i.e.*, documents that are "antecedent to the adoption of an agency policy." *Judicial Watch v. Dep't of the Army*, 435 F. Supp. 2d 81, 88-90 (D.D.C. 2006) (citation omitted); *Nat'l Res. Def. Council v. U.S. Dep't of Def.*, 388 F. Supp. 2d 1086, 1097-98 (C.D. Cal. 2005). In this instance, there is evidence that in 2010 or earlier, EPA had surreptitiously decided to block the Pebble Project using the Section 404(c) process. While EPA thereafter spent years going through the motions of analyzing Pebble, its conclusions were foreordained. Accordingly, the deliberative process privilege cannot apply to post-decision communications in this case, as those communications were not intended to assist EPA deliberations.

**Fourth**, the Request seeks documents that contain information regarding EPA's communications with groups outside the agency. While the deliberative process privilege may extend to a federal agency's communications with third parties, no protection is provided for communications with parties that are pursuing their own interests or the interests of other non-agencies. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (2001). Here, the FOIA request seeks communications between EPA and outsiders, including, among others, environmental groups and certain Indian tribes. These parties are pursuing their own interest separate from those of the EPA, and therefore communications with them should not be withheld.

In sum, EPA's invocations of deliberative process privilege are factually and legally insupportable. EPA should withdraw its privilege assertions and produce complete copies of the documents that it has withheld or redacted.

### **III. EPA's search for responsive documents was inadequate**

Under FOIA, an agency must conduct a "search reasonably calculated to uncover all relevant documents." *See Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir.

1983); *Nat'l Res. Def. Council v. U.S. Dep't of Def.*, 388 F. Supp. 2d 1086, 1095 (C.D. Cal. 2005). The issue is not whether additional responsive documents exist, but whether the search and subsequent production was reasonable under the circumstances. *See Weisberg*, 705 F.2d at 1351; *Nat'l Res. Def. Council*, 388 F. Supp. 2d at 1095.

There are indications in EPA's documents that its search and production processes were not reasonable. For instance, certain email attachments falling within the scope of the Request are apparently not included in EPA's production. 6/16/10 North email, Ex. 8 (missing "Projects Vetoed" attachment). EPA also provided in its Bristol Bay reading room numerous emails that are potentially responsive but that fail to identify EPA addressees. 11/1/10, 2/7/11, 4/10/12 emails, Ex. 9. Moreover, while EPA's reading room production indicates that Phillip North used his home email to conduct official agency business, there is no evidence that EPA searched for documents sent to or from employee personal emails or official secondary emails. 9/22/11 Parker email, Ex. 10 (referencing email from North's home). Furthermore, while it appears that Lisa Jackson considered the Pebble Project an important issue, EPA has produced no emails, texts, or other documents from her. Finally, the number of produced documents that mention EPA Region 10 Regional Administrator Dennis McLerran falls short of what would be expected, suggesting that EPA has not yet provided all of his materials.

The existence of deficiencies in EPA's search are further supported by serious allegations raised by another requester – Landmark Legal Foundation – in a currently-pending lawsuit, *Landmark Legal Foundation v. Environmental Protection Agency*, Case No.: 1:12-cv-01726 (RCL) (U.S. Dist. Ct., D.D.C.). Landmark has submitted evidence there that EPA failed to timely search the emails and texts of high-level officials in response to Landmark's FOIA request; was not candid in court filings describing its searches and productions; and failed to prevent the destruction of numerous potentially responsive materials, including emails and texts of former EPA Administrator Lisa Jackson. 7/24/14 Landmark Memorandum in Support of its Motion for Spoliation Sanctions and Supporting Memorandum, Dkt. 46, in *Landmark Legal Foundation v. Environmental Protection Agency*, Case No.: 1:12-cv-01726 (RCL) (U.S. Dist. Ct., D.D.C.). These colorable claims of EPA wrongdoing in response to a FOIA request support the view that EPA's response here was less than sufficient.

\* \* \* \* \*

EPA's response to the Request fails to satisfy FOIA. EPA has wrongly asserted deliberative process privilege to withhold documents, or to produce them only in redacted form. And there is evidence that EPA's search for documents in response to the Request has been lacking.

In light of the foregoing, PLP requests that EPA immediately produce in full all responsive documents that it has withheld or redacted on grounds of deliberative process privilege. This includes responsive documents on the FOIA website as well as in EPA's Bristol

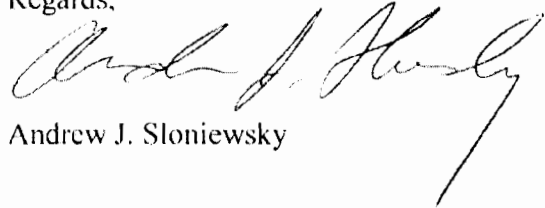
Headquarters –  
Freedom of Information Staff  
September 2, 2014  
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Bay reading room. PLP also request that EPA reinitiate its review and conduct a thorough search for responsive materials as required by FOIA.

If you have any questions about the foregoing, please feel free to contact me.

Regards,

A handwritten signature in cursive script, appearing to read "Andrew J. Sloniewsky". The signature is written in dark ink and is positioned above the printed name.

Andrew J. Sloniewsky

cc: Elizabeth McKenna (via email)  
Larry Gottesman (via email)

**Lewis, Judith**

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**From:** Sloniewsky, Andrew <ASloniewsky@steptoe.com>  
**Sent:** Tuesday, September 02, 2014 11:52 AM  
**To:** FOIA HQ  
**Cc:** Gottesman, Larry; McKenna, Elizabeth  
**Subject:** Pebble: Ltr to EPA re FOIA and Exhibits 1-10 - FOIA APPEAL  
**Attachments:** Exhibits 1-10.PDF; Ltr to EPA re FOIA.PDF

Dear Sir or Madam:

On behalf of Pebble Limited Partnership, attached please find its appeal of EPA's response to a January 2014 FOIA request (FOIA req. EPA-R10-2014-002963).

Please let me know if you have any questions regarding the attached.

Regards,

Andrew J. Sloniewsky

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